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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

FRANK DeLEGGE, SR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Frank DeLegge, Sr., prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated October 1, 1970, affirmed the judgment of conviction. The opinion of the Court of Appeals is reprinted as Appendix A, *infra*. The judgment order of the Court of Appeals was entered October 1, 1970 and is reprinted as Appendix B, *infra*. A Petition for Rehearing En Banc was timely filed but was denied by order dated December 2, 1970, which order is reprinted as Appendix C and Appendix D, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether under *Sheppard* v. *Maxwell*, 384 U.S. 333 and *Margoles* v. *United States*, 360 U.S. 310 the District Court erred in refusing to grant the motion for a change of venue and continuance based on prejudicial publicity and in failing to inquire of jurors during trial whether they had been exposed to publicity.

2. Whether the indictment misjoined the defendants in violation of Rule 18(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.

3. Whether under *Smith* v. *Illinois*, 390 U.S. 129 and *Garfolo* v. *United States*, 390 U.S. 144, the District Court so limited the cross-examination of key Government witnesses so that the defendant was deprived of a fair trial.

STATEMENT OF THE CASE

The substance of the indictment was that:

Count 2 charged the De Legges with bank robbery "together with" the other five participants.

Count 4 charged defendants, Daddano, Montagna and Cain with having knowledge of the actual commission of the bank robbery by the seven participants, "concealed, and did not as soon as possible make known the same to some judge or other person in civil authority under the United States, . . ."

Count 3 charged that Daddano, Montagna and Cain, knowing of the bank robbery by the seven participants, received, relieved, comforted, and assisted them in order to hinder and prevent their apprehension, trial and punishment. In addition to charging in the words of the statute, the indictment specified that the assistance for such purpose was given by causing the lie detector tests to be administered in order to determine whether certain persons were furnishing information about the robbery and the participants to governmental authorities.

Count 1 charged defendants, Daddano, Montagna and Cain in substance, with conspiring to commit the offenses charged in counts 3 and 4, in each case by means of the lie detector tests for the purposes described in those counts. Eight overt acts were alleged (and proved).

STATEMENT OF THE FACTS

On September 17, 1963, Michael La Joy, his uncle, Frank DeLegge, Sr., Joseph D'Argento, and Larry Fletcher were driving home to Chicago from Detroit. They began to talk about robbing the Franklin Park Bank in Franklin Park, Illinois, where De Legge, Sr. lived. The plans for the venture were developed at several later conversations in various places. The robbery was carried out shortly before noon on September 23.

There were several additions to and defections from the group. La Joy, D'Argento, Gerald Tomaszek, and Guy Mendola entered the bank. Patrick Schang was the driver and remained in the stolen automobile in which the group reached and left the bank. They had just come from the home of De Legge, Sr., on Manor Drive. De Legge, Sr. and Frank De Legge, Jr. had participated in the planning and had assisted in various preparations. De Legge, Sr. had suggested that after the robbery the group should go to a vacant house on Dora street which he owned and which was for sale. The car could be driven into the attached garage and the robbers could leave, presumably without drawing attention to themselves.

At the time of the robbery, De Legge, Sr. remained in his car near the bank. He had agreed to attempt to collide with a police car if that became necessary to aid in the getaway. The robbery was timed so that a freight train would be passing on a track just north of the bank and forming a barrier between the bank and the Franklin Park police station, north of the track. De Legge, Jr. had agreed to, and did, make a telephone call to the police station before the train arrived. He gave false information concerning a bomb in a school farther north, hoping to decoy the police in that direction.

De Legge, Jr.'s telephone call was too late to be useful, virtually coinciding with the alarm from the bank. Squad cars were dispatched promptly. The train was shorter than expected, and by driving on the sidewalk the police were able to get around the caboose and give immediate chase. De Legge, Sr. failed to produce a collision.

Schang, the robber's driver, was able, however, to lose his pursuers. He drove to the Dora street house and put the car in the garage. The men left the money, disguises and other equipment in the house, and departed on the run. Considerable commotion had been caused, however, by high speed, squealing tires, and flying gravel, and a series of mishaps, including the unforseen presence of a garbage truck in the alley through which they drove. The men were seen by one or more neighbors. A short time later the police arrived, found the car, and searched the house.

There had been an interval, however, in which the De Legges had come to the house, hidden the discarded items, and removed the money. Questioned later, they apparently satisfied the police or FBI agents that they were not involved with the robbers nor the use by the latter of De Legge Sr.'s vacant house.

In some manner La Joy, D'Argento, Tomaszek, and Schang promptly became suspects. On September 26, these four were indicted. They were arrested, but freed on bail October 3. De Legge, Sr. had taken some of the bank money and paid it to Rocco Montagna, a professional bondsman, who arranged for the bonds. De Legge, Sr. told La Joy and D'Argento in Montagna's presence that the money had come from proceeds of the robbery.

A question arose why Mendola, who had been a participant, had not been indicted. Later Schang began to sus-

pect that La Joy might have informed the police. Schang told Montagna of his suspicions. He was wary, however, because La Joy was the nephew of William Daddano. The evidence demonstrated that Daddano was one who spoke with a voice of authority in such matters. He is also De Legge Sr.'s brother-in-law and the uncle of both La Joy and De Legge, Jr. Montagna took Schang to Daddano.

Daddano decided that the participants would take lie detector tests, and that if anyone failed the test, the others could shoot him if they wished. Accordingly, in response to word from Montagna, La Joy, Schang, D'Argento, and Tomaszek met Montagna and Daddano at a bowling alley in the latter part of October. Montagna took the participants across the street to a motel. They went into a room one by one and were given a polygraph test by William Witsman. Witsman was then a detective in the Special Investigations Unit in the office of the sheriff of Cook county. The unit was headed by Chief investigator Richard Cain. Witsman attached the apparatus to each man, asked and twice repeated a list of questions, recorded the answers, removed each man's chart from the machine and handed it to Montagna. One of the questions was whether the man had given truthful information to a law enforcement agency.

Montagna delivered the charts to Daddano. A day later, in Daddano's presence, Montagna told the men they had passed.

Witsman testified that Cain had given him a list of the questions, told him to go to the motel, to give the tests to men who would be produced by a man he would meet there, not to interpret the charts, but to give them to the same man.

Some time later Cain directed Witsman to go to another address and administer similar tests to others. At the address was Montagna's home, and the men tested were the DeLegges and Mendola. Months later Witsman was disturbed by a news story which contained Schang's picture and by recognizing Schang as one of the men he had tested. Witsman telephoned Cain. Cain said not to worry about the charts because he had flushed them down the toilet.

Although no witness except Witsman described Cain's participation, the jury could properly infer from the circumstances, as it did, that Daddano must have explained his problem to Cain and that Cain had arranged the tests and interpreted the charts with knowledge of the circumstances and their purpose.

La Joy, Schang, D'Argento, and Tomaszek were tried for the bank robbery in 1965 and convicted. Some of them had testified in their own behalf, giving exculpatory and now admittedly perjured testimony. They received substantial sentences. La Joy, Schang, and D'Argento have been convicted of or charged with other offenses and face possible additional sentences. At various times in 1967 these three decided to give information to the government. Probably their cooperation with the government will help them, and they have much at stake. The government has given money to the families of La Joy and D'Argento in return for information received. In 1967 the indictment now under consideration was returned against the De Legges, Montagna, Daddano, and Cain. Mendola is deceased. The trial now under review occurred in September, 1968, and La Joy, Schang, and D'Argento testified to many of the facts set forth in the foregoing narrative.

REASONS FOR GRANTING THE WRIT

1. Under *Sheppard* v. *Maxwell*, 384 U.S. 333 and *Margoles* v. *United States*, 360 U.S. 310 the District Court erred in refusing to grant the motion for a change of venue and continuance based on prejudicial publicity and in failing to inquire of the jurors during trial whether they had been exposed to publicity.

Not once during the entire proceeding of the trial in this case were the jurors interrogated by the trial court to determine whether or not they had been exposed to the voluminous prejudicial publicity attendant to the case. In light of *Marshall* v. *United States*, 360 U.S. 310 the conviction should be reversed.

Pre-Trial Motions

This indictment was returned in March of 1968. At that time Richard Ogilvie was a candidate for the Republican nomination of Governor of the State of Illinois. A co-defendant, Richard Cain, was formerly the chief criminal investigator for Sheriff Ogilvie. Upon the return of the indictment against Cain and through the Spring of 1968, Mr. Ogilvie's political opponents emphasized the Ogilvie-Cain relationship and called it to the attention of the voting public through the news media. Examples of the press coverage were articles which stated in part:

> "'*The federal indictment charges* that while in the employ of Sheriff Ogilvie, *Cain was hired to give lie detector tests to syndicate members,* using sheriff's equipment,' Sheehan wrote.
>
> "And Sheehan brought up the name of Richard Cain, under indictment for bank robbery conspiracy.

> Cain, a former chief investigator for Ogilvie when the latter was Cook County Sheriff, had been called *an intimate of mob figures.*" (Emphasis added) Chicago *Sun-Times,* April 5, 1968 (C 162)
>
> "Both John Henry Altorfer of Peoria, considered to be Ogilvie's chief challenger, and State Sen. Arthur Gottschalk of Flossmoor, who has quit the race and will support Altorfer, have been *emphasizing the racket connections of Richard Cain.* Cain served Ogilvie as chief sheriff's investigator until he was *arrested on perjury and conspiracy charges.*" (Emphasis added), *Chicago Daily News,* March 20, 1968 (C 160)

Mr. Ogilvie was successful in obtaining the Republican nomination, and the Ogilvie-Cain relationship was renewed in the newspapers prior to and during this trial which began in September of 1968.

Based on the newspaper articles that had already been published and upon the likelihood that numerous, similar articles would be published if the trial were to take place prior to the election in November of 1968, the DeLegges made a motion for a continuance until December 1, 1968 and made a motion for a change of venue. (C 89-90, 41-42) These motions were denied. (C. 399)

The DeLegges' fear that there would be voluminous Ogilvie-Cain publicity which would also make reference to Cain's co-defendants was realized. Since the trial was in the midst of the Ogilvie gubernatorial campaign, the press coverage was overwhelming. Almost every one of the newspapers had daily articles which mentioned the Ogilvie-Cain relationship. (C. 684, 691, 725)

In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), this court stated at page 363:

> "But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the

judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

Also, the DeLegges moved prior to trial for the sequestration of the jury. (A. 12) The government, apparently agreeing that a sequestered jury was necessary for a fair trial, joined in the defendants' motion and did not object thereto. However, the trial court, *sua sponte,* denied what amounted to the joint motion of the DeLegges and the government and refused to order that the jury be sequestered. (A. 12)

Motions Made During the Trial

At almost every session of court, the DeLegges presented motions requesting the trial court to inquire of the jury whether they had been exposed to certain articles that had been published prior to that session of court. The trial court was asked both to inquire of the jurors as a whole (A. 14-15, 17, 18) and on other occasions was requested to inquire of the jurors individually and outside of the presence of each other. (A. 12-13) Not one of these requests was granted during the entire trial.

DeLegge, Sr. and Jr. were on trial only for the specific charge of robbery of the Franklin Park Bank. Yet the newspaper articles broadened the issues in the case and condemned the defendants because of what the newspapers considered their bad general reputation and character. The articles went further in making charges that the DeLegges had committed other specific heinous crimes for which they were not being tried. It should be noted that neither DeLegge, Sr. nor DeLegge, Jr. had ever been convicted of any crime, had been gainfully employed all their lives and had enjoyed an excellent reputation for

honesty and integrity in their community. (R. 1982, 1985, 1988, 2177) The government at no time during the trial produced evidence of their bad reputation in the community.

As to their general reputation, a sampling of the articles included such statements as:

> "Michael LaJoy, the government's star witness against Richard B. Cain *and four syndicate hoodlums,* told of undergoing lie tests to prove his loyalty to a robbery gang." (Emphasis added) *Chicago's American, September* 14, 1968 (C. 678)
>
> * * *
>
> "He [Cain] is accused of supervising lie detector tests to insure the loyalty of members of a *syndicate-controled hijacking gang."* (Emphasis added) *Chicago's American,* September 12, 1968 (C. 660)
>
> "A former deputy sheriff accused Richard Cain, 44, in court Tuesday of having supplied a lie detector machine used in a *crime syndicate hunt for a stool pigeon.* (Emphasis added) *Chicago's American,* September 25, 1968 (C. 725)
>
> "*Crime syndicate leaders* then were trying to identify an informant they believed had talked to the FBI about a $43,000 Melrose Park bank robbery on Sept. 23, 1963." (Emphasis added) *Chicago Sun-Times,* September 27, 1968 (C. 783)

The newspapers also accused the DeLegges of committing the specific crimes of hijacking and murder of Mendola. Concerning the crime of hijacking the articles stated:

> "Frank DeLegge, 50, and Frank, Jr., 30, *a father-and-son team in hijacking,* are charged with masterminding the bank robbery." (Emphasis added) *Chicago Sun-Times,* September 26, 1968 (C. 772)

"And the DeLegges—Frank the son and Frank the father—*up from the underworld ranks of cartage thieves,* sitting side by side with their laywer to the left of the court at their separate table, faces overlaid with tan, and careful eyes." (Emphasis added) *Chicago's American,* September 24, 1968 (C. 723)

"On trial for conspiracy with Cain are Daddano, Frank DeLegge, Sr., 50, *up through the underworld ranks from cartage thief;* his son, Frank Jr., 30, *a son-in-law of convicted extortionist Frank Palermo,* and Rocco (called Rocky or Schnibble Nose) Montagna, 52, a bail bondsman and political fixer." (Emphasis added) *Chicago Sun-Times,* September 16, 1968 (C. 684)

Certain of the articles concerning the murder of Mendola were doubly prejudicial in that they not only accused the defendants but further stated that the basis of the accusation was information received from federal and state authorities. Portions of these articles stated:

"*The prosecution contends* that one of the four men questioned, Guy [Lover Boy] Mendola, later was *killed by other gang members* because they believed he was lying when he answered 'no' to that question." (Emphasis added), *Chicago's American,* September 24, 1968 (C. 721)

"*Police said* they believe Mendola was *slain by other gang members,* probably to keep him from testifying against them." (Emphasis added) *Chicago Daily News,* September 12, 1968 (C. 663)

"*Police said* Mendola apparently was *slain by other gang members* who feared he had become a government informer. The slaying followed a series of *mob-ordered* lie detector tests of gang members in an attempt to find the informer." (Emphasis added), *Chicago Daily News,* September 17, 1968 (C. 705)

> "*Federal investigators said* Mendola apparently *was slain by other members of the robbery gang* and that he apparently *failed* his lie test." (Emphasis added) *Chicago Daily News*, September 11, 1968 (C. 641)
>
> "Charge 'Liar' Was Slain, *Chicago's American*, Headline, September 24, 1968 (C. 721)
>
> "A fifth participant in the robbery was Guy Mendola, who was murdered, allegedly *because he had talked to federal agents about the crime.*" (Emphasis added) *Chicago's American*, September 12, 1968 (C. 661)

These articles persisted despite the statement of the United States Attorney outside the presence of the jury that Mendola had never given the federal investigators any information. (R. 1825) Thus, Mendola would have no reason to have failed the lie detector test. Other articles combined the statements of the murder with statements of the defendants' syndicate connections:

> "Guy [Lover Boy] Mendola, 39, burglar and stick-up man who apparently had information on the bank robbery, was killed in a *gang style murder* by five shotgun blasts on Aug. 30, 1964." (Emphasis added) *Chicago Tribune*, September 13, 1968 (C. 659)
>
> "One of the gang, Guy [Lover Boy] Moischano, was *murdered in gang fashion* after allegedly being revealed as a stool pigeon following a lie test in a Franklin Park motel." (Emphasis added) *Chicago's American*, September 12, 1968 (C. 660)

It must have been such a case as this that Mr. Justice Douglas had in mind when he stated:

> "A defendant, however, is on trial for a specific crime, and is not to be condemned, imprisoned or executed for what laymen would call his bad character or reputation. See *Michelson* v. *United States*, 335

U.S. 469, 475-476. Rules of evidence are designed to narrow the issues and protect an accused against prejudice. Judges, not newspaper reporters, fashion and supervise those jobs.

* * *

"*The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced.*" (Emphasis supplied).

Douglas, *The Public Trial and the Free Press*, 46 A.B.A. Journal at page 841 (1960)

During a hearing outside the presence of the jury, a psychiatric report of the witness D'Argento was read by the United States Attorney. Counsel for the DeLegges moved the trial court to order the press not to publish the contents of this report on the authority of *Mares* v. *United States,* 383 F.2d 805 (10th Cir. 1967) That motion was denied. (R. 1017, 1023, 1025) The newspapers then deliberately quoted from the psychiatric report and mentioned the DeLegges' counsel's attempt to silence the press. A portion of these articles read:

"Foran read portions of the June 10, 1967, report to the judge. 'It recites that the prisoner was having a very difficult time,' Foran read. 'He is afraid for his life. *The organization of Chicago has passed a death sentence on him.* He does not know why this was done, but he is fearful and apprehensive.'

"Seeks News Gag

"Atty. Raymond Smith, representing the DeLegges, then made a motion asking the judge to instruct reporters in the courtroom not to report what had happened so the jury could not learn what was said out of their presence." *Chicago Tribune,* September 18, 1968 (C. 702)

When the articles were published, the DeLegges immediately renewed their motion requesting the trial court to inquire of the jurors whether they had been exposed to that publicity. This motion was also denied. (R. 1067-70) A denial of a similar motion concerning publication of a matter heard outside the presence of the jury required reversal in *United States* v. *Palermo,* 410 F.2d 468 (7th Cir. 1969).

The trial court's refusal to inquire of the jury concerning the prejudicial publicity constitutes reversible error under *Marshal* v. *United States,* 360 U.S. 310 and *United States* v. *Accardo,* 298 F.2d 133 (7th Cir. 1962).

The opinion in this case would set a new criteria for a trial court's determination to question jurors concerning publicity during trial. This criteria could be entitled "The Headline Theory." The proposed opinion conceded that "There can be no question but that if it were shown that a juror had read the items going beyond the record, particularly those referring to Mendola's death and those calling the defendants gangsters and the like, further inquiry with respect to their effect upon him would be required." (App. A. p. 15). After agreeing that the trial publicity was prejudicial the proposed opinion attempted to distinguish *United States* v. *Palmero,* 410 F.2d 468 (7th Cir. 1969), by stating, "It was held, however, that such admonitions could not be relied upon where prejudicial publicity was brought to his attention, and that he must question the jury to ascertain whether any had read or heard it. That was said, however, in a case where, although the opinion does not detail it, *headlines would virtually force the prejudicial material on a juror attempting to avoid it.*"

The opinion would then try to analyze only the headlines to determine prejudice and assume that the jury was not exposed to the body of the newspaper articles. Such a test is completely contrary to the mandate of *Marshall* v. *United States,* 360 U.S. 310 (1959). The *Marshall* case disavows guess work and assumptions since an easily made inquiry of the jury can dispel all doubts.

Even under the opinion's own test the distinction between the *Palermo* case and the present case is not valid. Contrary to the statement in the proposed opinion the headlines in *Palermo* were not more likely to "virtually force the prejudicial material on a jury attempting to avoid it," than were the headlines in the present case. An analysis of the publicity exhibits filed as part of the appendix in United States v. Palermo, et al., nos. 16593-16596, 16677, reveals first that the bulk of publicity relied on in the *Palermo* case was pre-trial publicity that occurred months before the actual trial, and secondly that most of the publicity related to the separate trial of Sam Battaglia. Trial publicity headlines in *Palermo* consisted of the following:

> "Negro Jurors Stay in Northlake Trial", "Northlake Extortion Judge Weighs Plea for Mistrial", "Defense Has Second Bad Moment in Extortion Case", "Northlake Bribe Witness Withstands Defense Grilling", "Contractor Tells Northlake Beating", "Extortion Trial Told of Pay-off Demand", "U.S. to All Anti-Mob Aides Here", "U.S. Heats Up War on Mob Here", "Sam Battaglia Transferred From Here to U.S. Prison", "Northlake Acquittal Bid Denied", "Justice Chiefs Here to Map War on Crime", "Northlake Defendants Lose Mistrial Plea", "Neri Extort Trial Expected to Go to Jury Tomorrow", "Threat to Kill Northlake Mayor Told", "Witness Tells of Hood's Threat to Northlake Mayor," "Defense Rests

in Neri Case; Two Balk at Testifying", "The Mob Story—How It Operates!", "Historic report 'Who's who' of Mob bared", "Crime Unit Names Top Chicago Hoods", "'Syndicate Figures and Fellow Travelers'", "List Bared of Top Mob Chief, Aids", and "Who's a Hoodlum? Many on list deny it".

As is clear many of these cited headlines referred to persons who were not defendants in the case, e.g. Battaglia and the headlines concerning, "The Mob", "The Syndicate", "Hoods", and "War on Crime" did not in any way themselves demonstrate a relationship to the defendants in the *Palermo* case.

A sampling of the headlines during trial in the appellant's case however stated,

"Bank Robber Testifies on *Mob* Lie Test, *Hoods* Feared There Was Informer" (C. 659), "Convicted Robber Links Ex-Cop, *Mob* to Holdup" (C. 660), "Cain Trial Told of *Mob* Lie Test to Trap Squealer" (C. 661). "Charge *'Liar' Was Slain"* (C. 721), *"Protected* Witness Relates Bank Holdup Linked to Cain" (C. 662), "Witness Describes *Gang's* own Lie Test" (C. 678), "Testifies Ex-Deputy Gave Lie Tests On Orders of *Gangster* In Cain Case" (C. 688), *"Mobster* Tells Planning of Bank Holdup" (C. 701), "Cain Informer Charges Plot Against Life" (C. 702), "Anti-Cain Witness Charges Murder Attempts in Prison" (C. 703), "Convict Stuns Cain Trial with Murder Charge" (C. 704), "Prison plot to *Slay* Him, says Cain Trial Witness" (C. 706), "Cain Ordered Lie Tests for *Mob,* Ex-Deputy Says" (C. 723), "Ex-Deputy Accuses Cain of Ordering Lie Tests For Gang" (C. 725), "Put Hoods on Lie Box, Ex-Cop Says" (C. 728), "Gave Lie Test to Gang, Says Ex-Aid of Cain" (C. 729), "U.S. Denies Mendola Was a 'Stool Pigeon'" (C. 770), "Prosecutor Tells Cain Trial: There Was No Informer" (C. 772), "U. S. Attorney Denies Mendola Told Gangland Secrets" (C. 774), and "Trial Disclosure Mendola Not Bank 'Pigeon'" (C. 785).

Clearly even under the new found "Headlines Test" of the opinion the trial court erred in *never* inquiring of the jurors concerning publicity.

2. The indictment misjoined the defendants in violation of Rule 18(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.

Frank DeLegge, Sr. and Frank DeLegge, Jr. were indicted only in Count 2 of the indictment on the charge of bank robbery. None of the co-defendants (Montagna, Cain and Daddano) was charged in this count of the indictment. The DeLegges were in no way mentioned in the other counts of the indictment. Even the conspiracy charge against the other three co-defendants did not name the DeLegges as unindicted co-conspirators or in fact mention them in an overt act.

Prior to the trial and on several occasions during the trial, the DeLegges moved for a severance on the ground that the indictment misjoined the defendants and offenses. These motions were all denied. (A. 1, 6, 10, 14-18)

Rule 8(b) of the Federal Rules of Criminal Procedure permits the joinder of defendants if they are alleged to have participated in (1) the same act or transaction or (2) the same series of acts or transactions constituting an offense or offenses. In *Ingram* v. *United States,* 272 F.2d 567 (4th Cir. 1959), the court interpreted Rule 8(b) and held:

> "Rule 8(b) * * * provides that two or more defendants *may* be jointly charged if they are alleged to have participated in the same act or transaction. The necessary inference from this is that they *may not* be jointly indicted or tried in the absence of a common act or transaction. * * * [T]he joinder of defendants

and offenses totally unconnected is prohibited by Rule 8(b). This is not a matter of discretion; both the statutory language and the decided cases make this clear.

"[In *McElroy* v. *United States,* 164 U.S. 76, 81 the Supreme Court said that joinder of counts for several felonies of the same general nature 'cannot be sustained where the parties are not the same, and where the offenses are in nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them.'] In other words, where multiple defendants are charged with offenses in no way connected, and are tried together, [the defendants] are prejudiced by that very fact, and the trial judge has no discretion to deny relief." 272 F.2d at 569-70.

In *Metheany* v. *United States,* 365 F.2d 90 (9th Cir. 1966), as here, defendants were indicted together but no count charged them jointly. The defendant Metheany was charged by Count 1 with the fraudulent concealment from a trustee in bankruptcy of a sum of money and by Counts 3 through 6 with making false oaths concerning matters relating to the bankruptcy proceedings; while the defendant Dodson was similarly charged by Count 2 with concealing an additional amount of money from the same trustee in bankruptcy. The Court in *Metheany* held that the two defendants were misjoined because although the offenses were "similar", the two defendants did not participate in the same act or series of acts constituting an offense or offenses. The Court in *Metheany* went on to hold that:

"* * * any misjoined defendant who suffered a conviction was entitled to a new trial separate from the others for the reason that '[i]t cannot be said in such case that all the defendants may not have been

> embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Metheany* v. *United States,* 9th Cir., 365 F.2d 90, 94-5, citing *McElroy* v. *United States,* 164 U.S. 76, 81, and *Culjak* v. *United States,* 9th Cir., 53 F.2d 554.

The offense of bank robbery here is not even "similar" to the offenses with which the DeLegges' co-defendants were charged. The obviously distinct elements of these crimes demonstrate that the same act or series of acts constituting a single offense were not involved. Further the indictment did not even *allege* that the defendants participated in the same act or series of acts, and therefore a severance was required under Rule 8(b).

Even if Rule 8(b) were discretionary the government would not have an argument of practicality of a joint trial as to the DeLegges. The government argued during the trial in answer to the co-defendants' motion for severance that it was necessary to prove the bank robbery in order to prove the conspiracy. Clearly, however, the government cannot argue that it was required to prove the co-defendants' conspiracy in order to prove the bank robbery.

However, *Ward* v. *United States,* 289 F.2d 877 (D.C. Cir. 1961) points out that Rule 8(b) is not discretionary. The Court in *Ward* held that:

> "But 'where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and *the trial judge has no discretion to deny relief.' Ingram* v. *United States,* 4 Cir., 1959, 272 F.2d 567, 570. See also *Schaffer* v. *United States,* 1960, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921; *McElroy* v. *United States,*

1896, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355; *United States* v. *Welsh*, D.C. 1953, 15 F.R.D. 189, 190." (Emphasis added)

Ward v. *United States*, D.C. Cir., 289 F.2d 877, 878

United States v. *Gougis*, 374 F.2d 758 (7th Cir. 1967) followed the reasoning of the Fourth Circuit in the *Ingram* case. Unlike the case presently before this court, Gougis was charged jointly with other defendants in some of the counts of the indictment. However, Gougis was not mentioned in two substantive counts. The court held that the joinder of the defendants in this manner was a violation of Rule 8(b).

Although demonstration of prejudice is not necessary under Rule 8(b), it was clear from this record that the defendants, DeLegge, Sr. and DeLegge, Jr., were greatly prejudiced by the joinder of offenses and defendants. For example, there was evidence introduced that during a meeting in preparation of the taking of the lie detector tests, one of the co-defendants had made the statement that the informer would be shot and would be left on the [lie] box (R. 1363) and that one of the co-defendants would "hit him [the informant] in the head." (R. 856) Not only did the trial court deny the DeLegges' motions for severance but even denied their several motions to strike as to them all testimony relating to the acts of the three co-defendants. (R. 1361)

The violation of Rule 8(b) by the joinder of Counts 1, 3 and 4 with Count 2 and the joinder of the defendants requires a reversal as to the defendants, DeLegge, Sr.

3. Under *Smith* v. *Illinois*, 390 U.S. 129 and *Garfolo* v. *United States*, 390 U.S. 144, the District Court so limited the cross-examination of key Government witnesses so that the defendant was deprived of a fair trial.

The bank robbers, D'Argento, Schang and LaJoy, were the three vital government witnesses to the DeLegges alleged involvement in the robbery. Until these three men became available as government witnesses some four years after the bank robbery, the DeLegges were not even indicted. It was absolutely essential to the defense to lay before the jury the true picture of the character, veracity and bias of these three witnesses.

Fundamental to a defendant's right to cross-examination is the ability to ask a witness his present employment and address. *Alford* v. *United States,* 282 U.S. 687 (1931) and *Smith* v. *Illinois,* 390 U.S. 129 (1968). *Shaw* v. *Illinois,* ..... U.S. .....; *Garfolo* v. *United States,* 390 U.S. 144. Schang was asked where he lived; where he worked; whether he was supporting himself and how much money he made a month. (R. 1433, 1429, 1428, 1416) LaJoy was also asked where he lived. (R. 601) On each occasion that these questions were asked, the prosecutor made an objection without stating his reason for so objecting. Each objection was sustained by the trial court. Here, there was no evidence of an actual threat to either LaJoy or Schang if they testified against the defendants, and in objecting the prosecutor did not even allege that there was such a threat.

In *United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969) the court held that in particular the witness Patrick Schang should have been required to answer the questions concerning his address and employment. This is the same Patrick Schang that testified against the defendants here. In fact the defendant Daddano was a defendant in *United States* v. *Varelli,* No. 66 CR 247, although he was acquitted by the jury in that case.

In its presentation of the case against the defendants, the government gave an affirmative indication that there

had been no threats against the witnesses in this case. On direct examination the prosecutor voluntarily questioned the important government witness Witsman concerning his place of employment and his address. (R. 1554)

The defendants were also prohibited from questioning Schang as to whether he suborned perjury at his own trial. (R. 1468-9) The defense was precluded further in inquiring of LaJoy concerning a specific act of perjury by LaJoy at his own trial, (R. 459, 461-462, 714-716), participation in the bribing of a juror in *United States* v. *Panczko,* (R. 462-464) and subornation of perjury in his own defense (R. 464-466)

The court held in *United States* v. *Varelli,* as to the same witness Schang that restriction of cross-examination concerning his alleged subornation of perjury at his own trial was reversible error. Surely the limiting of the questions of LaJoy is equally erroneous.

The defendants, having been deprived of effective cross-examination of the key government witnesses, were not afforded their right to a fair trial and a reversal should be granted.

ADOPTION

The petitioner specifically adopts the reasons for granting the writ and the arguments of the petitioners, Daddano, Cain, and Montagna.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND J. SMITH
Attorney for Petitioner

APPENDIX

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1969 — SEPTEMBER SESSION, 1969

Nos. 17283, 17340
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM DADDANO, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 1, 1970

Before FAIRCHILD, CUMMINGS, *Circuit Judges,* and GRANT, *District Judge.*[1]

FAIRCHILD, Circuit Judge. These are appeals by five defendants from judgments entered upon guilty verdicts after a joint trial.

The evidence, when conflicts are resolved and permissible inferences drawn consistently with the verdicts, presents an unusual story, which we now, in outline, recount. The names of the present defendants are italicized.

[1] Chief Judge Grant of the Northern District of Indiana, is sitting by designation.

On September 17, 1963, Michael La Joy, his uncle, *Frank De Legge, Sr.,* Joseph D'Argento, and Larry Fletcher were driving home to Chicago from Detroit. They began to talk about robbing the Franklin Park Bank in Franklin Park, Illinois, where *De Legge, Sr.* lived. The plans for the venture were developed at several later conversations in various places. The robbery was carried out shortly before noon on September 23.

There were several additions to and defections from the group. La Joy, D'Argento, Gerald Tomaszek, and Guy Mendola entered the bank. Patrick Schang was the driver and remained in the stolen automobile in which the group reached and left the bank. They had just come from the home of *De Legge, Sr.,* on Manor Drive. *De Legge, Sr.* and *Frank De Legge, Jr.* had participated in the planning and had assisted in various preparations. *De Legge, Sr.* had suggested that after the robbery the group should go to a vacant house on Dora street which he owned and which was for sale. The car could be driven into the attached garage and the robbers could leave, presumably without drawing attention to themselves.

At the time of the robbery, *De Legge, Sr.* remained in his car near the bank. He had agreed to attempt to collide with a police car if that became necessary to aid in the getaway. The robbery was timed so that a freight train would be passing on a track just north of the bank and forming a barrier between the bank and the Franklin Park police station, north of the track. *De Legge, Jr.* had agreed to, and did, make a telephone call to the police station before the train arrived. He gave false information concerning a bomb in a school farther north, hoping to decoy the police in that direction.

Unfortunately for the robbers, *De Legge, Jr.'s* telephone call was too late to be useful, virtually coinciding with the alarm from the bank. Squad cars were dispatched promptly. The train was shorter than expected, and by driving on the sidewalk the police were able to get around the caboose and give immediate chase. *De Legge, Sr.* failed to produce a colllision.

Schang, the robbers' driver, was able, however, to lose his pursuers. He drove to the Dora street house and put the car in the garage. The men left the money, disguises and other equipment in the house, and departed on the run. Considerable commotion had been caused, however, by high speed, squealing tires, and flying gravel, and a series of mishaps, including the unforeseen presence of a garbage truck in the alley through which they drove. The men were seen by one or more neighbors. A short time later the police arrived, found the car, and searched the house.

There had been an interval, however, in which the *De Legges* had come to the house, hidden the discarded items, and removed the money. Questioned later, they apparently satisfied the police or FBI agents that they were not involved with the robbers nor the use by the latter of *De Legge Sr.'s* vacant house.

In some manner La Joy, D'Argento, Tomaszek, and Schang promptly became suspects. On September 26, these four were indicted. They were arrested, but freed on bail October 3. *De Legge, Sr.* had taken some of the bank money and paid it to *Rocco Montagna*, a professional bondsman, who arranged for the bonds. *De Legge, Sr.* told La Joy and D'Argento in *Montagna's* presence that the money had come from proceeds of the robbery.

A question arose why Mendola, who had been a participant, had not been indicted. Later Schang began to suspect that La Joy might have informed the police. Schang told *Montagna* of his suspicions. He was wary, however, because La Joy was the nephew of *William Daddano.* The evidence demonstrated that *Daddano* was one who spoke with a voice of authority in such matters. He is also *De Legge Sr.'s* brother-in-law and the uncle of both La Joy and *De Legge, Jr. Montagna* took Schang to *Daddano.*

Daddano decided that the participants would take lie detector tests, and that if anyone failed the test, the others could shoot him if they wished. Accordingly, in response to word from *Montagna,* La Joy, Schang, D'Argento, and Tomaszek met *Montagna* and *Daddano* at a bowling alley in the latter part of October. *Montagna* took the participants across the street to a motel. They went into a room one by one and were given a polygraph test by William Witsman. Witsman was then a detective in the Special Investigations Unit in the office of the sheriff of Cook county. The unit was headed by Chief Investigator *Richard Cain.* Witsman attached the apparatus to each man, asked and twice repeated a list of questions, recorded the answers, removed each man's chart from the machine and handed it to *Montagna.* One of the questions was whether the man had given truthful information to a law enforcement agency.

Montagna delivered the charts to *Daddano.* A day later, in *Daddano's* presence, *Montagna* told the men they had passed.

Witsman testified that *Cain* had given him a list of the questions, told him to go to the motel, to give the tests to men who would be produced by a man he would

meet there, not to intepret the charts, but to give them to the same man.

Some time later *Cain* directed Witsman to go to another address and administer similar tests to others. At the address was *Montagna's* home, and the men tested were the *De Legges* and *Mendola*. Months later Witsman was disturbed by a news story which contained Schang's picture and by recognizing Schang as one of the men he had tested. Witsman telephoned *Cain*. *Cain* said not to worry about the charts because he had flushed them down the toilet.

Although no witness except Witsman described *Cain's* participation, the jury could properly infer from the circumstances, as it did, that *Daddano* must have explained his problem to *Cain* and that *Cain* had arranged the tests and interpreted the charts with knowledge of the circumstances and their purpose.

La Joy, Schang, D'Argento, and Tomaszek were tried for the bank robbery in 1965 and convicted. Some of them had testified in their own behalf, giving exculpatory and now admittedly perjured testimony. They received substantial sentences. La Joy, Schang, and D'Argento have been convicted of or charged with other offenses and face possible additional sentences. At various times in 1967 these three decided to give information to the government. Probably their cooperation with the government will help them, and they have much at stake. The government has given money to the families of La Joy and D'Argento in return for information received. In 1967 the indictment now under consideration was returned against the *De Legges, Montagna, Daddano,* and *Cain.* Mendola is deceased. The trial now under review occurred

in September, 1968, and La Joy, Schang, and D'Argento testified to many of the facts set forth in the foregoing narrative.

There can be no real challenge to the sufficiency of the evidence to support the facts just narrated. The story is, indeed, unusual. But the testimony was not inherently incredible. The jury was fully informed of the circumstances which bore upon the credibility of La Joy, D'Argento, and Schang, including their interests in recognition by the government of their cooperation, but the jury believed them. The jury also believed Witsman, and drew inferences as to *Cain's* guilty knowledge and intent which the jury was entitled to draw. We do not consider it necessary to set forth a detailed analysis of the supporting evidence.

We proceed to deal with the various attacks upon the indictment as matters of law, the claims that the facts narrated do not add up to guilt of the offenses charged, and claims of error in procedure and at trial.

Count 2 charged the *De Legges* with bank robbery[2] "together with" the other five participants. It further charged that they put lives in jeopardy by the use of dangerous weapons,[3] but the jury found them guilty only of the lesser offense. Counsel challenges the sufficiency of the evidence to support the verdict, apparently on the basis that what the *De Legges* did was short of "participation." *De Legge, Sr.'s* standing by in his car to protect

[2] 18 U.S.C. §2113(a).
[3] 18 U.S.C. §2113(d).

the getaway, though he failed, and *De Legge, Jr.'s* telephone call to the police would qualify, it seems, as "participation", if that is meaningful and important, but the government proved other acts of aiding, abetting, and counselling the offense, making the *DeLegges* punishable as principals under 18 U.S.C. § 2 in any event.

1. *Challenges to the indictment.*

Counts 1 (conspiracy), 3 (accessory after the fact) and 4 (misprision of felony) charged *Daddano, Montagna,* and *Cain.* (Varelli, not on trial, was also charged in counts 1 and 4.)

Count 4[4] charged that defendants, having knowledge of the actual commission of the bank robbery by the seven participants, "concealed, and did not as soon as possible make known the same to some judge or other person in civil authority under the United States, . . ." After completing the charge in the words of the statute, the indictment specified that defendants caused lie detector tests to be administered in order to determine whether certain persons were furnishing information concerning the bank robbery and the perpetrators thereof to governmental authorities lawfully investigating the same.

Count 3[5] charged that defendants, knowing of the bank robbery by the seven participants, received, relieved, comforted, and assisted them in order to hinder and prevent their apprehension, trial and punishment. In addition to charging in the words of the statute, the indictment specified that the assistance for such purpose was given by causing the lie detector tests to be administered in order

[4] Misprision of felony. 18 U.S.C. §4.

[5] Accessory after the fact, 18 U.S.C. §3.

to determine whether certain persons were furnishing information about the robbery and the participants to governmental authorities.

Count 1[6] charged defendants, in substance, with conspiring to commit the offenses charged in counts 3 and 4, in each case by means of the lie detector tests for the purposes described in those counts. Eight overt acts were alleged (and proved).

Defendants argue that misprision of felony is not sufficiently alleged unless a particular act of concealment is specified, and that the giving of lie detector tests to determine whether certain persons were furnishing information to the authorities is not an act of concealment.

Defendants rely upon *Bratton* v. *United States*[7] holding (1) that 18 U.S.C. §4, defining misprision, requires an affirmative act of concealment in addition to failure to disclose the felony to the authorities, and (2) that an indictment merely alleging concealment was insufficient. We agree with (1).[8] We agree, however, with a later decision in the tenth circuit, that an indictment simply using the words of the statute and alleging concealment and failure to make known is sufficient.[9] In any event, the giving of the lie detector test was an affirmative act, alleged in the indictment, and although the nexus between

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[6] Conspiracy, 18 U.S.C. §371.

[7] (0 Cir., 1934), 73 F2d 795.

[8] *Neal* v. *United States* (8th Cir., 1939), 102 F2d 643; see 21 Am. Jur. 2d Criminal Law §7, pp. 87-8.

[9] *Sullivan* v. *United States* (10th Cir., 1969), 411 F2d 556.

the determination of who was giving information to the authorities and the accomplishment of the concealment was not spelled out, it could readily be inferred.

At trial there was evidence which tended to prove that defendants intended that anyone found to have furnished information to the authorities would be silenced, and that the entire procedure and accompanying threats (even on the assumption the tests were only simulated and were not adequate for a qualified examiner to state an opinion) were intended to emphasize to all participants the desirability of withholding information from the authorities.

Of course, at the time the lie detector tests were given, the authorities had enough information about the participation of four men to have had them indicted. It has been held that it is unimportant whether the government did or did not know of the principal crime or who the perpetrator was before the person charged with misprision took affirmative steps to conceal the crime.[9a] Even if, however, suppression of testimony against the already indicted defendants would not constitute misprision, the felonies committed by the *De Legges* and Mendola had not yet become known to the authorities. The administration of the tests, in the aura of intimidation, concealed for the time being the felonies committed by the latter three, even though the fact of the robbery was well known and the participation of the other four sufficiently so.

Defendants contend that the misprision statute must not be applied to them because it would compel them to be witnesses against themselves. The theory is that if they

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[9a] *Lancey* v. *United States* (9th Cir., 1966), 356 F2d 407.

reported their information about the bank robbery as soon as they received it, they could reasonably fear that the information could lead to their own conviction of being accessories after the fact or some other related offense. This is particularly urged by *Montagna,* who knowingly received part of the stolen money. Defendants rely on *United States* v. *King*[10] which appear to support their claim, at least in dictum. We think the answer to this argument and, with all respect, to that holding of *King,* is that the offense of misprision as defined in 18 U.S.C. §4 consists of an act of concealment in addition to failure to disclose. Thus the statute does not purport to punish one solely for failure to report facts which he has reasonable fear might lead to his conviction of crime.

It appears that none of the bank robber witnesses testified before the grand jury which returned the indictment in this case. Presumably the grand jury were apprised of what they knew by investigative reports or similar hearsay. Defendants note the second circuit criticism of this practice.[11] Part of the theory is that if a witness who testifies against a defendant at trial did not testify before the grand jury, there is no transcript of grand jury testimony to use in attempting impeachment. But the reasons for permitting use of prior testimony, if it exists, to impeach trial testimony do not, it seems to us, compel the creation of prior testimony so that it can be so used. The fifth amendment requirement of indictment

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[10] (9th Cir., 1968), 402 F2d 694.

[11] *United States* v. *Arcuri* (2d Cir., 1968), 405 F2d 691, 694, and cases cited therein.

by a grand jury is not violated where "all the evidence before the grand jury was in the nature of 'hearsay'."[12]

The *De Legges* are charged only in Count 2 and the other three in Counts 1, 3, and 4. All claim improper joinder of defendants.

Rule 8(b), F.R. Cr. P., authorizes joinder of two or more defendants if they are alleged to have participated in the same transaction or in the same series of transactions constituting offenses.

The robbery of the bank, and the set of events surrounding the lie detector tests are very closely related. The supposed need for the lie detector set of events grew out of the bank robbery. They were, in a sense, designed for the benefit and protection of the *De Legges* and other alleged robbers. They followed the robbery in a short period of time. In order to prove the offenses allegedly arising out of the lie detector events, it was essential to prove the bank robbery. It may be reasonable, for the purposes of Rule 8(b), to consider both sets of events as parts of one transaction. But even if each set of events be deemed a separate transaction, we think the relationship is close enough that they may be deemed a "series" under Rule 8(b). In either event the participants in one set of events may be joined as defendants with the participants in the other.

In *United States* v. *Scott*[13] this court held that three

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[12] *Costello* v. *United States* (1956), 350 U.S. 359, 363, 76 S Ct. 406, 100 LEd 397; *United States* v. *Braico* (7th Cir., 1970), 422 F2d 543, 545.

[13] (7th Cir., 1969), 413 F2d 932.

defendants could properly be joined in one indictment charging three of them with one theft, two with a different theft, and one with a third. The three thefts were deemed a series of transactions under Rule 8(b) on the ground that they were part of a common plan. The pattern of events considered in *Scott* is different from the one at hand, and we do not consider the common plan test applied in *Scott* as exclusive. Rule 1.2 of the ABA Standards Relating to Joinder and Severance, quoted in part in *Scott*, not only permits joinder of defendants where the several offenses were part of a common scheme or plan, but also where they "were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." (Rule 1.2(c)(ii).)

Precise, inelastic codification of the situations where joinder is reasonable and not unfair is extremely difficult. We think joinder was reasonable here.

Defendant also moved for severance under Rule 14, F.R. Cr. P., "Relief from Prejudicial Joinder". We find no abuse of discretion in the denial of their motions.

II. *Denial of Continuance because of pretrial publicity.*

Some of the defendants sought a continuance of transfer of this case because prejudicial publicity had occurred or was anticipated.

In 1963 when the bank robbery and lie detector events occurred, *Cain* was chief investigator of the Special Investigations Unit under the sheriff of Cook county. The present indictment was filed March 5, 1968, superseding an indictment filed against *Cain* later in 1967. The trial occurred in September, 1968. The 1968 campaign for

governor was under way, the election would be held in November, and one of the principal candidates for governor had been sheriff when *Cain* was chief investigator. Public comment was made from time to time during the campaign about *Cain's* indictment.

Defendants' argument was that these facts did and would increase the amount of publicity before and during trial, and that a continuance or transfer was required. The district court denied the motions.

Newspaper stories were placed in the record. We readily assumed that considerable publicity was and would be generated by a charge that an intermediary for bank robbers called on the sheriff's office for help in finding out which robber was squealing to the police; and that a highly placed enforcement officer arranged for lie detector tests to be given to assist in the inquiry. Political campaigners doubtless tried to use this material to advantage. Stories reporting the trial appeared daily.

But overall the quantity of publicity in the record is not impressive when the size of the metropolis is considered. The newspapers were very far from being saturated and nothing is shown with respect to other media.

The ultimate question is whether it is possible to select a fair and impartial jury, and in most situations the *voir dire* examination adequately supplies the facts upon which to base that determination.[14]

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[14] *Margoles* v. *United States* (7th Cir., 1969), 407 F2d 727; *Blumenfield* v. *United States* (8th Cir., 1960), 284 F2d 46, 51; *Jones* v. *Gasch* (D.C.Cir., 1967), 404 F2d 1231, 1239, cert den. 396 U.S. 1029. But see Commentary ABA Standards Relating to Fair Trial and Free Press pp. 54-67, suggesting limitations on the effectiveness of *voir dire*.

When the jury was being selected here, only four prospective jurors indicated bias, one of them saying he could not keep an open mind because of exposure to publicity. All were excused. We are not persuaded that it was an abuse of discretion to proceed with the trial in Chicago in September.

III. *Publicity during trial.*

The jury was selected September 9 and 10, 1968. The trial began September 11 and the case submitted to the jury October 1. Until the latter date, the jury was permitted to separate.

On September 9, the trial judge explained to all the prospective jurors the necessity that a juror decide the case only upon the evidence presented in open court and avoid conversation and exposure to reports about the case. He ordered each one, even more broadly, "not to read any newspapers or any other journal, not to listen to the radio or to look at or listen to television programs". He meticulously repeated this order before each recess, so that on the 15 days on which the jurors were present, the order was given 46 times.

From time to time defense counsel brought newspaper stories to the attention of the judge, and requested that he question the jurors to determine whether any had read them and what prejudicial effect they may have had. The judge declined to do so, pointing to the order so explicitly and frequently given and relying upon the presumption that the order had not been violated.

More than 50 clippings from four Chicago newspapers are in the record. Some evidently appeared on the front page, many do not indicate the page, and many were on other pages. Only one full width headline appeared on the front page. It clearly did not go beyond the record.

In the main the stories reported the progress of the trial including claims made and evidence advanced by various defendants as well as the prosecution. Some of the stories, however, included material beyond the record, of which the jury should not be informed. There were several inaccurate statements which would have readily been recognized by the jury as mistakes. There were references to several of the defendants in terms indicating underworld or other criminal activity. The fact that Mendola was dead was known to the jury. Defenses cross-examination of one witness had suggested the witness may have been involved in Mendola's murder, but a number of the news stories described Mendola's death by shotgun and suggested that he had been killed because of his failure to pass the lie detector test. This did not appear in the heading of any story. Three stories on one day referred to government witness D'Argento's belief that his life was threatened by a Chicago organization, and the headings of these stories so reflected. They were not on the front page. D'Argento had testified on cross-examination that his life had been threatened, and although the judge struck the answer, the jury had heard it. It appeared that defense counsel who asked the question had reason to anticipate the answer.

There can be no question but that if it were shown that a juror had read the items going beyond the record, particularly those referring to Mendola's death and those calling the defendants gangsters and the like, further inquiry with respect to their effect upon him would be required.

The practice followed in this trial, occurring in September, 1968, clearly does not comply with the pronounce-

ment of this court several months later on March 4, 1969, in *Margoles* v. *United States*:[15]

> "Thus, the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, then the judge is not required to proceed further."

This court had not propounded a similarly comprehensive rule in earlier decisions.

The court's decision in 1962, reversing a conviction in *United States* v. *Accardo*[16] was based upon its "special facts", which are readily distinguishable from the present case. The *Accardo* trial lasted more than eight weeks, front page headlines carried prejudicial material and the trial judge gave his orders not to read about the trial only at the beginning of the selection of the jury. He declined, as here, to poll the jury when prejudicial publicity was brought to his attention.

Viewing the special facts of the instant case, tried before our pronouncement in *Margoles*, we think the trial judge could reasonably presume that jurors followed the orders so carefully and frequently given, and that they neither intentionally read the stories nor had prejudicial material forced upon them.

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[15] (7th Cir., 1969), 407 F2d 727, 735.

[16] 298 F2d 33.

We acknowledge that shortly after the decision in *Margoles,* this court reversed a pre-*Margoles* conviction in *United States* v. *Palermo.*[17] There the same trial judge had given similar careful and frequent admonitions. It was held, however, that such admonitions could not be relied upon where prejudicial publicity was brought to his attention, and that he must question the jury to ascertain whether any had read or heard it. That was said, however, in a case where, although the opinion does not detail it, headlines would virtually force the prejudicial material on a juror attempting to avoid it. We do not deem it controlling here. Cf *United States* v. *Solomon* (7th Cir., 1970) 422 F.2d 1110, 1118-1119, cert. denied *sub nom. Sommer* v. *United States,* 399 U.S. 911.

IV. *Restriction of cross-examination.*

La Joy, D'Argento, and Schang were extensively cross-examined. In each case defense counsel brought out many facts which might damage credibility: convictions of crimes, pendency of outstanding charges, perjury in other trials, exposure to long sentences, hope for leniency from the government, refusal to talk with defense counsel, payment of money by the government to the wives of La Joy and D'Argento in return for information supplied by the husbands.

Defense counsel claim error under *Alford* v. *United States*[18] and *Smith* v. *Illinois.*[19] La Joy testified he was

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[17] (7th Cir., 1969), 410 F2d 468, 471.

[18] (1931), 282 U.S. 687.

[19] (1968), 390 U.S. 129.

serving his sentence and in the custody of the marshal, but that he was no longer in the penitentiary. The court sustained objections to questions seeking to learn where he was then living. Schang testified that after a period in jail he had been released on bond and was still allowed to be free on bond. He testified that he is employed. Objections were sustained to questions as to the identity of his employment and where he was living.

We think that although the particular questions are literally the kind with which *Alford* and *Smith* deal, defense counsel had nevertheless been afforded "the opportunity to place the witness in his proper setting". Under the circumstances the trial judge did not abuse his discretion. The harassment or danger to which an answer would probably expose Schang, at least, was implicit in the situation and in view of the admissions already before the jury it is hard to imagine that the answers would have added or led to any significant material bearing upon the credibility of the witnesses.

Other claims of undue restriction on cross-examination relate to situations where counsel brought before the jury much of the substance of what he wanted to show. Each claim ultimately collides with either the proposition that the court did not abuse his discretion in stopping inquiry where he did, or that if there was error, it was harmless.

V. *Other claims.* Numerous other arguments are advanced, including allegedly undue limitation of argument by defense counsel and allegedly unrestrained excesses in argument by the government. *Cain* argues several other points, including the proposition that his subpoenas requiring the IRS to produce income tax returns of government witnesses should have not been quashed.

We have examined all these arguments and are satisfied that no reversible error has been shown.

VI. *Daddano's challenge to his consecutive sentences.*

Daddano was sentenced to five years on count 1, seven years on count 2, and three years on count 4. The terms are consecutive and cumulative fines were imposed. He argues that these are all sentences for the same act of giving a lie detector test and are illegal.

It is well settled that consecutive and cumulative penalties may be imposed for separate offenses. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."[20]

It is readily apparent that the offense of conspiracy is distinct from the other two, since it must be proved that two or more conspired, but need not to be proved that a substantive offense was completed.

Whether misprision and being an accessory after the fact are distinct from each other seems a closer question. Probably most instances of misprision involve, in actuality, being an accessory after the fact. Comparing the statutes literally, however, 18 U.S.C. §3 (accessory after the fact) requires a purposeful relationship between the

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[20] *Blockburger* v. *United States* (1932), 284 U.S. 299, 304; *United States* v. *Nobel* (3rd Cir., 1946), 155 F2d 315, 318; *Newman* v. *United States* (6th Cir., 1954), 212 F2d 450; *Gore* v. *United States* (D.C.Cir., 1957), 244 F2d 763; *Dear Wing Jung* v. *United States* (9th Cir., 1962), 321 F2d 73, 75; *United States* v. *Barnett* (6th Cir., 1969), 418 Fd 309, 312.

acts of the accessory and the principal offender. The accessory must receive, relieve, comfort or assist the principal offender in order to hinder or prevent his apprehension, trial or punishment. 18 U.S.C. §4 (misprision) requires concealment of the commission of the felony, a fact not necessarily required by §3, but does not require an intent to benefit the principal offender, although such benefit usually results. We conclude the offenses are distinct for the purpose of imposing cumulative penalties.

The judgments appealed from are affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, October 1, 1970

Before

HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. GRANT, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17283, 17340 vs.

WILLIAM DADDANO, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, December 2, 1970

Before

HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. GRANT, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17283 vs.

WILLIAM DADANNO, et al.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17340 vs.

RICHARD CAIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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On consideration of the separate petitions for rehearing en banc filed herein by the defendants-appellants, William Daddano, Richard Cain, Rocco Montagna and Frank De Legge, Sr.; no judge in regular service nor member of the panel having requested a vote thereon,

IT IS ORDERED that each of the above petitions for rehearing en banc be and the same are hereby denied.

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, December 2, 1970

Before

HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. GRANT, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17283 vs.

WILLIAM DADANNO, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

IT IS ORDERED by the Court that the petition for rehearing filed in this appeal by defendant-appellant, Frank De Legge, Sr., be and the same is hereby denied.